

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 4, 2004 Session

**ALICE JUNE ATKINS and CLARA OLLIE NEEDHAM v. STATE OF
TENNESSEE**

**Direct Appeal from the Tennessee Claims Commission
Nos. 01307801 and 01307701 Hon. Vance W. Cheek, Jr., Commissioner**

FILED APRIL 14, 2004

No. E2003-01255-COA-R3-CV

The Claims Commissioner awarded damages for personal injuries to claimants on grounds the State was liable under Tennessee Code Annotated § 9-8-307(a)(1)(I). On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Claims Commission Affirmed.

HERSCHEL PICKENS FRANKS, J. delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Paul G. Summers, Attorney General and Reporter, Dawn Jordan and Sarah T. Chambers, Assistant Attorneys General, Nashville, Tennessee, for Appellant.

Mark S. Stapleton, Rogersville, Tennessee, for Alice June Atkins.

D. Scott Hurley, Knoxville, Tennessee, for Clara Needham.

W. Lewis Jenkins, Jr., Dyersburg, Tennessee, for Appellees on Appeal Only.

OPINION

In these actions the State of Tennessee appeals from Judgments entered by the Claims

Commission against it for damages sustained by plaintiffs resulting from an automobile accident.¹

The accident occurred on a connector road that joined old and new sections of U.S. Highway 25E (a.k.a. State Route 32) near Bean Station in Grainger County, Tennessee. The connector road and temporary tie-in was completed in August 1989 as part of a larger State improvement project that would upgrade some portions of the highway from two lane to four lane, and totally replace other portions. The temporary tie-in and connector in question cut off about 800 feet of the old road, in order to transition traffic between old and new sections of SR.32. Eventually the plan was for the four-lane road to continue. The site of this accident was at this “dog leg” temporary tie-in that connected the old and new sections of the highway. The connector was built so that a motorist traveling from Old State Route 32 to the temporary tie-in would make a sharp left turn followed by a few feet of roadway before coming to stop sign perpendicular to the intersection of the connector and the temporary tie-in.

Plaintiffs brought these actions after their accident, and based their claims on Tenn. Code Ann. § 9-8-307(a)(1), which states:

9-8-307. Jurisdiction - Claims - Waiver of actions - Standard for tort liability - Damages - Immunities - Definitions - Transfer of claims. - (a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the State based on the acts or omissions of “State employees” as defined in 8-42-101(3) falling within one (1) or more of the following categories:

...

(c) Negligently created or maintained dangerous conditions on a State-controlled real property. The claimant on this sub-section must establish the foreseeability of the risk and notice given to the proper state officials at a time sufficiently prior to the injury for the State to have take appropriate measures; . . .

(I) negligence in planning and programming for inspection of, design of, preparation of, plans for, approval of plans for, and construction of, public roads, streets, highways or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the Department of Transportation as being on the State system of highways or the State system of interstate highways;

¹The accident occurred in November of 1989. The case was tried in June of 2002, and Judgment was entered in April of 2003.

(J) dangerous conditions on State-maintained highways. The claimant under this subsection must establish the foreseeability of the risk and notice given to the proper State officials at a time sufficiently prior to the injury for the State to have taken appropriate measures; . . .

At trial, the proof established that the State had designed a plan to warn motorists of the sharp left turn they would encounter prior to the intersection and stop sign. This safety scheme included two “stop-ahead” signs, one on each side of the road, a “sharp curve” sign with a 15 m.p.h. speed advisory, and several chevrons. There is no evidence establishing what signs, if any, were present on the day the accident occurred.

The federal government required that 800 feet of pavement of the old road that was cut off by the connector be removed. This old roadbed was supposed to be scarified, reshaped and seeded to prevent ingress, egress, and parking around the area. This had not been done prior to the accident, but an earthen berm had been constructed at the request of the federal government just past where the road made the sharp left turn. The parties dispute whether this berm was properly constructed in such a manner as to protect vehicles running off the road from careening into a concrete ditch. The objective of the modifications were to prevent driver confusion where the old road ended and transitioned into the new road and also to prevent illegal use of the unused highway by street vendors.

Atkins and her mother, Ms. Needham, were returning home from a visit with relatives who lived less than a mile from the connector road. They had traveled over the route several hours earlier. It was “dusty dark” when they started home after their visit. The weather conditions were clear and the road was dry. Ms. Atkins testified that she was going only 20 to 25 m.p.h., and remembered that there was a sharp curve in the road but wasn’t certain as to its exact location. Just prior to the accident, she remembered seeing the tail lights of a car ahead of her in the distance. These lights turned out to be taillights of cars on the new SR 32, which appeared to be directly in line in front of the driver as she proceeded north and prior to making the sharp left turn where the old road cuts off. Ms. Atkins testified she began cutting her wheel in anticipation of the sharp curve but failed to negotiate it. Instead, the car left the roadway, traveling over the earthen berm and came to rest in a concrete culvert on the other side. She testified she did not have time to brake and that she saw no warning signs or traffic indicators just prior to the accident. She said she did not realize she had left the road until she saw the “big stack of dirt” directly in front of her. She does not remember the accident itself and was revived as rescue personnel were cutting her and her mother from the wreckage.

Both Ms. Atkins and Ms. Needham testified there were no signs on the road warning of the curve or the stop sign ahead.²

²Their Complaint alleges the signs had either been knocked down or removed, but no evidence was presented on this allegation.

The plaintiffs sustained severe and life threatening injuries in the accident. Ms. Needham was hospitalized for five months and accumulated approximately \$297,000.00 in medical expenses. Ms. Atkins' injuries were not as severe as Ms. Needham; but she sustained approximately \$10,000.00 in medical expenses. Both continue to experience difficulty and have only partially recovered from their injuries.

Plaintiffs presented the expert testimony of Don Moore, a licensed civil engineer with 30 years experience in designing roadways and transportation-related projects in the public and private sectors. His experience involved actual design of highways, and extensive experience with roadway signs and marking. Mr. Moore testified to many specific errors committed by the State in the design, construction and maintenance of the connector road in question. Generally, the errors concerned faulty placement of warning signs and the overall deficiency of the design of the plan for signs; lack of inspection before, during and after installation; issues regarding the proper striping in the curve itself and visibility of the side or "fog lines;" failure to obliterate the fog lines of the section of the old road which had been cut off by the new connector because it could confuse a driver approaching the curve; and the confusing placement of warning signs out of logical and sequential order.³ Specifically, the "stop ahead" sign preceded the "sharp curve" sign, the opposite order as the conditions are encountered by the driver. Moore testified that in his opinion these factors, many of which are in violation of the Manual on Uniform Traffic Control Devices ("MUTCD"), were a breach of the standard of care owed to the plaintiffs and the proximate cause of the accident.

Defendant's expert was Dr. Robert Stammer, an engineering professor at Vanderbilt University. His testimony for the most part consisted of negating plaintiff Moore's expert's opinions. Dr. Stammer found no violation of the standard of care by the State. He allowed that the State was negligent in its failure to remove the old roadway and continuing fog lines per the federal government's instructions, but he did not believe this was the proximate cause of the accident. However, he opined that Ms. Atkins was 25-30% at fault for the accident.

Appellant introduced no evidence of any specific negligent acts on the part of Ms. Atkins, other than the fact that she failed to negotiate the turn and had driven over it earlier in the day from the opposite direction. Moreover, the State produced no direct evidence that the warning signs were in place on the date of the accident. The record establishes that there was evidence of the plan for signage but no evidence or documentation as to whether it had actually been implemented.

At the close of plaintiffs' proof on the Motion by the State for a directed verdict, the Commissioner held on the issue of notice that there was no evidence of notice to the State as required in Tenn. Code Ann. §9-8-307(a)(1)(C) and (J), and the action was dismissed as to these sections for failure to prove notice to the State of a dangerous condition. The case proceeded to

³There were no pictures of the site at the time of the accident. The pictures introduced as exhibits were taken six to nine months post-accident, and formed the basis of both experts' opinions.

judgment on plaintiffs' claim under § 9-8-307(a)(1)(I).

The Commissioner took the matter under advisement, and subsequently issued his Opinion, finding the State 100% at fault for the accident. Clara Needham was awarded \$300,000.00 in damages, and Alice Atkins was awarded \$50,000.00. The Commissioner found that the State was liable under Tenn. Code Ann. § 9-8-307(a)(1)(I) for negligent design, planning, construction, inspection and maintenance of the connector road. Among the specific holdings of the Commissioner are the following:

- The re-design and construction resulted in a “frightfully dangerous connector road” and was unreasonably dangerous to reasonable drivers;
- The State breached its duty of reasonable care to the plaintiffs by designing and creating a dangerous condition that proximately caused Plaintiffs’ accident and was reasonably foreseeable to the State;
- “The risk that a motor vehicle would not be able to negotiate a drastically sharp left turn given the lack of sufficient traffic control devices, if any were in place, jump the earthen berm insufficiently constructed to stop a vehicle and crash a concrete ravine was not too remote for the State to have guarded against it under these circumstances;”
- The State failed to design and install adequate signs and warnings; the signs were either not in existence or not sufficiently visible to the motorist; even if they were installed and operational, the design plan itself was defective;
- The “T design” creating a curve that was too sharp, the insufficient signage, and the deficient berm combined to create a “non-malicious yet dangerous trap;”
- The injury in general was foreseeable to the State such that the potential increase in safety by correcting the deficiencies far outweighed any burden upon the State to accomplish such repairs;
- The Commissioner opined that one of his greatest difficulties in evaluating the evidence was the lack of proper chevron placement. If the chevrons were in place at all on the date of the accident, they were placed incorrectly by not being directly in the driver’s line of sight and directly in front of the curve, as directed in the MUTCD;
- Despite her best efforts to drive safely, Ms. Atkins did not have adequate opportunity to process whatever information was presented to her as she approached the curve;
- In one of its more curious findings that Commissioner found that “the issue of comparative fault is a black and white issue. Either Mrs. Atkins failed to drive properly or the State’s negligent design of the roadway was the cause of the wreck.” Ms. Atkins was apportioned no liability, leaving the State with 100% of the liability for this accident.⁴

Direct appeals from the Tennessee Claims Commission are governed by the

⁴The parties stipulated at trial that passenger Clara Needham was 0% at fault in the accident.

Tennessee Rules of Appellate Procedure. Tenn Code Ann. § 9-8- 403(a)(1). Appellate review is *de novo* upon the record of the Commission with a presumption of correctness of the Commissioner's findings of fact. Errors of law accompany no such presumption. Tenn. R. App. P. 13(d); *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989); *Belcher v. State*, 2003 WL 22794479 (Tenn. Ct. App. 2003).

The State's first issue is that the Commissioner erred by changing its ruling after granting a partial "directed verdict" at the close of Plaintiffs' proof. Specifically, the State contends that at trial the Commissioner held Plaintiffs had failed to establish existence of a dangerous condition, then reversed himself in the written Final Judgment.

As a preliminary matter, it should be noted that the parties and the Commissioner mistakenly acted pursuant to Tenn. R. Civ. P. 50. Such motion was neither necessary or proper in a case which is being tried without a jury; the proper motion in a bench trial is a motion to dismiss pursuant to Tenn. R. Civ. P. 41.02(2). *City of Columbia v. C.F.W. Const. Co.*, 557 S.W.2d 734 (Tenn. 1977). However, the Court may in its discretion treat a motion denominated as a motion for directed verdict as a Rule 41.02(2) motion for involuntary dismissal. *Scott v. Pulley*, 705 S.W.2d 666, 672 (Tenn. Ct. App. 1985).

A Rule 41.02(2) motion challenges the sufficiency of proof, and does not raise issues of law. *Smith v. Inman Realty Co.*, 846 S.W.2d 819, 821 (Tenn. Ct. App. 1992). When confronted with such motion, the trial court "must impartially weigh and evaluate the evidence just as though it were making findings of fact after presentation of all the evidence. If the plaintiff's case has not been established by a preponderance of the evidence, the case should be dismissed if, on the facts found. . .[and] the applicable law, plaintiff has shown no right to relief." *Atkins v. Kirkpatrick*, 823 S.W.2d 547, 552 (Tenn. Ct. App. 1991).

Essentially, appellant argues that the Commissioner directed a verdict on the issue of whether a "dangerous condition" existed on the day of the accident, then reconsidered the evidence in his Final Judgment. Appellants have misconstrued the Commissioner's finding. He expressly declined to rule on the dangerous condition issue. The record shows that he found that plaintiffs had not met the "notice" requirements of Tenn. Code Ann. § 9-8-307(C) and (J) and liability under these sections was not considered by the Trial Court in his final judgment ruling.

The State further contends that because the Commissioner made a favorable ruling on their behalf at the close of the plaintiffs' proof, it did not put on evidence of discretionary function immunity and was prejudiced thereby. In this regard the State did not raise this as an affirmative defense in their Answer. *See* Tenn. R. Civ. P. Rule 8.03.

We find this issue to be without merit.

Appellant's second issue argues that the plaintiffs did not prove the existence of a dangerous condition on the road by a preponderance of evidence. Much of the State's argument

focuses upon a showing that a dangerous condition either did not exist or was not a proximate cause of the accident. Violations of this section can result in creating road conditions which cause accidents. Accordingly, the issue on appeal is more accurately considered as design and planning issues.

To successfully prevail, the claimant must show: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; and (3) causation in fact and for a proximate cause of damages or injury. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993); *McClenahan v. Cooley*, 806 S.W.2d 767 (Tenn. 1991). The standard of care imposed upon governments in building and maintaining roads is one of reasonableness. *Swain v. City of Nashville*, 92 S.W.2d 405, 406 (Tenn. 1936).

State and federal law impose an affirmative duty upon governmental entities to inventory, inspect, classify and maintain roads in accordance with reasonable standards. *Austin v. State*, 796 S.W.2d 449, 455 (Tenn. 1990). This includes the duty owed to all persons lawfully traveling upon the highways to exercise reasonable care under all the attendant circumstances in planning, designing, constructing and maintaining the State system of highways. Tenn Code Ann. § 9-8-307(a)(1)(I); *Goodermote v. State*, 856 S.W.2d 715, 720 (Tenn. Ct. App.1993). Among the factors the Court, as the finder of fact, is to consider are: (1) the physical aspects of the road; (2) the frequency of accidents at the site; and (3) expert testimony in arriving at this factual determination. *Sweeney v. State*, 768 S.W.2d 253, 255 (Tenn. 1989). In this case, both parties presented oral expert testimony, and the Commissioner credited plaintiffs' expert, Mr. Moore. When issues regarding credibility of witnesses and the weight to be given their testimony are before a reviewing court, deference is accorded the trial court's factual findings. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn.1997). See also, *Clark v. Nashville Machine Elevator Co. Inc.*, 2004 WL 438325, *3 (Tenn. 2004). Resolving the conflicting testimony of experts falls within the province of the trier of fact. *State v. Flake*, 88 S.W.3d 540 (Tenn. 2002), and where an expert witness's testimony is supported by the evidence and the trier of fact credits that testimony over others, there is no basis to reverse the court's findings. *State ex rel Balsinger v. Town of Madisonville*, 435 S.W.2d 803 (Tenn. 1968).

The State further argues that plaintiffs failed to connect any of the State's alleged errors and deficiencies in its design and maintenance of the road as the proximate cause of the accident itself. *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991) sets forth a three-part test to determine proximate causation. In this case, the evidence establishes the proximate cause of the plaintiffs' injuries was the failure of the State to properly plan, install and/or maintain an effective safety scheme in full compliance with the industry standards set forth in the MUTCD and as explained by plaintiffs' expert, the State's conduct was a substantial factor in bringing about these injuries. The evidence does not support a finding that the operation of Ms. Atkins vehicle was a contributing proximate cause to the accident. The State was not required to foresee the exact manner of an accident at this location; it was only necessary that the general manner of loss and injury be reasonably foreseeable in the abstract. *Id.*

The State's final issue is that the Commissioner erred in attributing 100% fault to the State for the accident. The trial court has latitude in allocating fault between or among parties. *Coln v. City of Savannah*, 966 S.W.2d 34, 44 (Tenn. 1998); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). Negligence and proximate cause are fact questions, unless the evidence and reasonable inferences therefrom are so free of conflict that all reasonable minds must agree upon the conclusion. *Williams v. Brown*, 860 S.W.2d 854, 857 (Tenn. 1993); *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994). In this case the Commissioner had the opportunity to see and observe each witness and assess her credibility. He meticulously reviewed every witness and exhibit *in seriatum* in a 42 page opinion. The Commissioner assessed the weight and credibility of the experts as well as the other witnesses in his capacity as the trier of fact, and chose between conflicting and competing testimony. See generally, *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn.1997); *State v. Flake*, 88 S.W.3d 540 (Tenn. 2002). The evidence in this record does not preponderate against his finding of fault. Tenn. R. App. P. 13(d). *Realty Shop v. R.R. Westminster Holding*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999), *citing*, *Estate of Haynes v. Braden*, 835 S.W.2d 19, 20 (Tenn. Ct. App. 1992). In view of our findings, we pretermitt the plaintiffs' appeal of the Commissioner's exclusion of the expert opinion portions of a State employee's deposition.

Finally, plaintiffs contend that the Commissioner's award of \$50,000.00 to Ms. Atkins does not fully compensate her for her injuries. While not ignoring or minimizing the substantial impact of this accident upon Ms. Atkins, the award she received was five times her incurred medical expenses, and we conclude from the nature of her injuries and expenses that the Commissioner's award is well within the range of reasonableness and we affirm the Judgment.

For all of the foregoing reasons, we affirm the Judgment of the Commissioner and remand with the cost of the appeal assessed to the State.

HERSCHEL PICKENS FRANKS, J.